LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 29 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 499

THE NEW MEXICO PUBLIC SERVICE COMMISSION, and JOSEPH A. BURSEY, PHIL LUCERO and L. J. CHAMBARD, Commissioners,

and

OTERO COUNTY ELECTRIC COOPERATIVE, INC.,

Petitioners,

vs.

COMMUNITY PUBLIC SERVICE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

BOSTON E. WITT
Attorney General of New Mexico
Supreme Court Building
Santa Fe, New Mexico

LELAND STONE
Special Assistant Attorney General
Public Service Commission
Capitol Building
Santa Fe, New Mexico

BIGBEE & BYRD
By: Harry L. Bigbee
Richard N. Carpenter
Suite 200, Bokum Building
Post Office Box 669
Santa Fe, New Mexico

WILLIAM M. SIEGENTHALER
Post Office Drawer Z
Artesia, New Mexico

HEIDEL, SWARTHOUT & SAMBERSON
By: Andrew M. Swarthout
Post Office Box 1298
Lovington, New Mexico

SCHIFANI BROTHERS PRINTING CO., INC. SANTA FE, N. M.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 499

THE NEW MEXICO PUBLIC SERVICE COMMISSION, and JOSEPH A. BURSEY, PHIL LUCERO and L. J. CHAMBARD, Commissioners,
and
OTERO COUNTY ELECTRIC COOPERATIVE, INC.,
Petitioners,
vs.
COMMUNITY PUBLIC SERVICE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

REPLY TO POINT I OF ARGUMENT

Respondent attempts to argue by this Point I that the 14th Amendment played a small role in the formulation of the judgment and opinion of the Supreme Court of New Mexico, and that the Supreme Court of New Mexico placed its judgment upon an independent and adequate ground of decision, i.e., Art. II, § 18 of the New Mexico Constitution. This is simply erroneous.

The New Mexico Supreme Court first held that what it deemed to be discriminatory

> "is not permitted under the Constitution of the United States, Frost v. Corporation Commission, 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483. The equal protection clause protects against 'invidious discrimination.' To our minds, the invidious discrimination present in the legislation under consideration is too apparent to require elaboration. See Morey v. Doud, 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485." (Appendix A of Petition, pp. 40-41)

After stating the objection and basing it solely upon the 14th Amendment, the court below partially quoted a passage in *Frost v. Corporation Commission*, 278 U. S. 515 (1929), which it thought to be controlling. Only then did the Supreme Court of New Mexico return to the equal protection clause of Art. II, § 18 of the New Mexico Constitution, and only after first taking care to point out that the state constitutional provision and the 14th Amendment "have for all practical purposes the same effect." (Appendix A of Petition, pp. 41-42). Petitioners respectfully submit that one cannot reasonably conclude that, when read as a whole, the judgment rested upon an independent and substantial state constitutional provision.

Jankovich v. Indiana Toll Rd. Com'n., 379 U. S. 487 (1965), cited by respondent on page 8 of Brief of Respondent in Opposition, is not applicable for the reason that this Court therein held that it is not deprived of jurisdiction to review a state judgment relying on similar provisions in both the State and Federal Constitutions unless the state constitutional provision provides an "independent and adequate ground of decision." This is a case, unlike that cited by respondent, where the judgment and opinion of the Supreme Court of New Mexico "leaves the impression that the court probably felt constrained to rule as it did because of [decisions applying the 14th Amendment]," *Minnesota v. National Tea Co.*, 309 U. S. 551, at 554-55 (1940), or "because it felt under compulsion of federal law as enunciated by this Court so to hold," *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U. S. 1, 5 (1950), with the result that the state and federal grounds are "so interwoven that we are unable to conclude that the judgment rests upon an independent

interpretation of State law," *State Tax Com'n of Utah v. Van Cott*, 306 U. S. 511, 514 (1939).[1]

REPLY TO POINT II OF ARGUMENT

In its Point II, respondent argues that the New Mexico situation is unique and, while acknowledging that "the opinion below of the Supreme Court of New Mexico is the only reported case in the United States dealing with the issue here involved," concludes "that a decision of this Court on the issue would affect no state other than New Mexico." (Brief for Respondent in Opposition, pp. 10-11) While your petitioners humbly submit that the widespread affect of the decision within New Mexico and its adverse affect upon REA security on cooperatives' plant therein alone warrant this Court's consideration, it is untrue that the importance of the issue is limited to New Mexico.

Contrary to respondent's assertion, the judgment below has application in the East, West, North and South by directly challenging present or future state regulation of the rural electric cooperative as now organized, as well as affecting the tax dollars of United States taxpayers wherever situate invested in federally assisted and cooperatively supplied electricity. Moses, "Electrification and Telephone Programs," 30 Rocky Mountain Law Review 473, at 474 (1957-58) states:

> "Shortly after the adoption of the Rural Electrification Act in 1936, a so-called Model Rural Electrification Act was introduced and, with the usual variations generally encountered in the adoption of uniform laws, was adopted in twenty-seven states."

---

[1] In addition, Supreme Court review cannot be evaded by the invocation of an insubstantial non-federal ground as a device to prevent a review of the decision upon the federal question. *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*, 243 U. S. 157, 164 (1917); *Ward v. Love County*, 253 U. S. 17, 22 (1920); *Postal Tel. Cable Co. v. Newport*, 247 U. S. 464, 475-76 (1918); *Lawrence v. State Tax Commission*, 286 U. S. 276, 282 (1932). See also the cases cited in footnote 52, Petition, page 35, where in analgous situations this Court has granted certiorari.

Besides New Mexico, the following states are listed as having adopted the model act: Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont and Virginia. Three of New Mexico's neighbors, for example, have rural electric cooperative legislation the same or similar to that held by the Supreme Court of New Mexico to conflict with state public utility regulation.[2] Can it thus be said that the issue in the present case has no importance outside New Mexico? The answer, petitioners respectfully submit, is no, and the issue is one warranting review by this Court.

REPLY TO POINT III OF ARGUMENT

In its final point, respondent argues that the decision is clearly correct based upon a proper application of the precedents of this Court. Respondent, however, cites only *Frost v. Corporation Commission*, supra, which petitioners have shown to have been misapplied (Petition, pp. 29-32), and does not discuss the conflict between the judgment below and the many other precedents of this Court set forth by petitioners (Petition, pp. 12-28). In addition, respondent did not attempt to refute the basic factual differences between the investor owned utility and the rural electric cooperative,[3] and the abuse of

---

[2] Respondent focuses upon the service limitation of § 45-4-3(d) (Appendix D of Petition, p. 86), limiting Otero's service to members of the cooperative, governmental units and others not in excess of 10% of the number of its members, as the crux of the alleged discrimination. (Brief for Respondent in Opposition, pp. 4-6, 12-13) Oklahoma has the same limitation (Okla. Stat. Ann. § 437.2(d)) and Texas and Arizona have an even stricter service limitation, to members only (Vernon's Anno. Tex. Stat., Art. 1528b, § 4(4); Ariz. Code Ann. § 10-754(4)).

[3] Smith, "The Co-op as a Vehicle for Power Service," 60 Public Utilities Fortnightly 442 (1957) recognizes and emphasizes the differences between the cooperative and investor owned electric utility, in terms of non-profit vs. profit, one vote per member vs. one vote per share, patronage refunds vs. dividends, tax treatment, Federal loans, differing state utility regulation, and membership and ownership of assets. The author is an attorney for respondent in this case.

wasteful duplication sought to be remedied by New Mexico Laws 1961, Chapter 89, justifying different treatment. (Petition, pp. 12-24) In order to avoid repetition, petitioners respectfully re-submit the argument and authority contained in their petition herein.

CONCLUSION

For the reasons stated in the Petition and hereinabove, it is respectfully submitted that in the exercise of this Court's sound judicial discretion, review on writ of certiorari should be granted.

Respectfully submitted,

BOSTON E. WITT
Attorney General of New Mexico
Supreme Court Building
Santa Fe, New Mexico

LELAND STONE
Special Assistant Attorney General
Public Service Commission
Capitol Building
Santa Fe, New Mexico

BIGBEE & BYRD
By: Harry L. Bigbee
Richard N. Carpenter
Suite 200, Bokum Building
Post Office Box 669
Santa Fe, New Mexico

WILLIAM M. SIEGENTHALER
Post Office Drawer Z
Artesia, New Mexico

HEIDEL, SWARTHOUT & SAMBERSON
By: Andrew M. Swarthout
Post Office Box 1298
Lovington, New Mexico

Attorneys for Petitioners.